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Issue Date: 29 October 2003

Case No.: 2002-LHC-2321

DOL No.: 06-187762

In the Matter of:

TIMOTHY J. MONTELEONE,
Claimant

v.

BLUEPOINT INTERNATIONAL FISHERIES, INC.,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:[1]

John M. Schwartz, Esq.
For the Claimant

Allen C.D. Scott, II, Esq.
For the Employer

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (hereinafter referred to as the "LHWCA" or the "Act").

[1] The Director, OWCP, was not represented by counsel at the hearing.

Following proper notice to all parties, a formal hearing in this matter was held before the undersigned commencing on February 4, 2003 in Orlando, Florida, and concluding on February 6, 2003 in Viera, Florida. At the hearing, the undersigned ruled that the record would be held open for 45 days until March 20, 2003 for the submission of the Claimant's closing brief (Tr. 222), with the Employer's closing brief due 30 days later on April 20, 2003, and holding the record open an additional 20 days beyond that, or until May 10, 2003, for submission of the Claimant's rebuttal brief. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder and to submit post-hearing briefs. All briefs have been filed and carefully reviewed.

Stipulations

The parties submitted the following stipulations:

1. The Claimant and the Employer were in an employee-employer relationship at the time of the alleged injury (Tr. 5); and,

2. The alleged injury occurred on June 1, 2001 (Tr. 6).

Issues[2]

The Issue in this case is:

1. Whether the Act (33 U.S.C. § 901, *et seq.*) applies to this claim.

The findings and conclusions that follow are based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

[2] This case was previously assigned to Administrative Law Judge Richard T. Stansell-Gamm. Judge Stansell-Gamm's December 2, 2002 Order stated that jurisdictional arguments should be incorporated as part of a presentation of the merits. Both parties focused their closing briefs primarily on the jurisdictional issue. Having held below that the LHWCA does not apply to this claim, I limit my discussion to jurisdiction.

Findings Of Fact And Conclusions Of Law

Background

The Claimant, Timothy J. Monteleone, was age 46 at the time of the hearing, with a third-grade education level (Tr. 32). The Employer, Bluepoint International Fisheries, Inc. ("Bluepoint"), is a seafood processing company located near Port Canaveral, Florida (Tr. 119). Harvested sea products, including scallops and shrimp, are delivered to the Employer by truck and by fishing vessel for processing at the Employer's facility (Tr. 57, 122).

The Claimant has worked as a seasonal employee with the Employer since 1992 (Tr. 35). The Claimant was hired on this occasion in anticipation of an upcoming calico scallop run (Tr. 144). The Claimant worked from January 30, 2001 through June 4, 2001 (Tr. 147). According to the Employer's records and the testimony of Keith Smith, the Employer's General Manager, the Claimant was engaged in processing scallop medallions from January 30, 2001 through March 22, 2001 (Tr. 152). His assigned duties from March 22, 2001 through June 4, 2001 were directly related to calico scallop production (Tr. 155-57). During times when scallops were being processed, the Claimant either ran a shaker machine or he cleared the debris and mud generated by the shaker (Tr. 103). When scallops were not being processed, the Claimant was assigned to yard work, which included mowing grass, weed removal, and trash removal (Tr. 99).

From March 22, 2001 through June 4, 2001, the Employer processed 90 boat loads of calico scallops weighing 3,212,000 pounds gross, and processed nine shrimp boat deliveries weighing 49,466 pounds gross (Tr. 162-164). Of the nine shrimp boats processed, only four boats made direct deliveries to the Employer's seawall (Tr. 164).

During the last shrimp boat delivery to the seawall, the Claimant was allegedly injured while stacking bags of shrimp onto a pallet (Tr. 36).

Medical Evidence

As the parties have focused their arguments primarily on jurisdictional issues, and because of my finding herein, the limited medical evidence in the record is not listed separately here, but rather incorporated by reference.

Discussion and Applicable Law

Jurisdiction of the LHWCA

Congress, in 1927, passed the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"). The Act was a workmen's compensation program which compensated an employee for injuries arising out of and in the course of employment, but it was "designed simply to be a gapfiller to fill the void created by the inability of the states to remedy injuries on navigable waters." *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 258 (1977). Since the enactment of the LHWCA, Courts have struggled to define the line between state workers' compensation and LHWCA jurisdiction. *Id*. at 256-65.

To clarify its intentions, Congress enacted the 1972 Amendments to the LHWCA, creating a two-prong test which looked at both the "situs" of the injury and the "status" of the injured, to determine eligibility for compensation. *Maher Terminals, Inc. v. Director OWCP*, 330 F.3d 162, 166 (3rd Cir. 2003). Congress included a broad geographical area in the "situs" component of the test, including both injuries on water and areas on land that are connected to maritime activity. *Id*. Congress limited the persons who fulfill the "status" test to those who are engaged in maritime employment. *Id*. 33 U.S.C. § 902(3) defines maritime employment as "any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker…." While this definition of maritime employment was fairly imprecise, Congress provided a "typical example" of the intended expanded coverage. *See* H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4708. The Supreme Court interpreted the typical example provided to indicate Congress's intent "to cover those workers involved in the essential elements of unloading a vessel – taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." *Caputo*, 432 U.S. at 267.

The 1972 Amendments, however, resulted in broader LHWCA jurisdiction than Congress had intended. *Id*. at 272-73. Therefore, in 1984, Congress attempted to narrow the jurisdictional limits of the LHWCA by identifying and excluding workers "who, although by circumstance happened to work on or adjacent to waters, lacked a sufficient nexus to maritime navigation and commerce." S.Rep. No. 98-81, at 24-25 (1983). Congress achieved this result by redefining the statute's

definition of "employee." LHWCA Amendments of 1984, Pub.L. No. 98-426, 98 Stat. 1639, 1655, § 28(c) (codified in relevant part at 33 U.S.C. § 903(3)).

The 1984 Amendments' definition of "employee" now excluded "aquaculture workers" subject to workers' compensation from coverage. *Id.* While the revised statute does not define the term aquaculture worker, the term is defined in the Code of Federal Regulations as:

> Those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, and the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species.

20 C.F.R. § 701.301(a)(12)(iii)(E) (1994). The exclusion of aquaculture workers applies even if the claimant is injured over navigable waters. *Id.*

Situs Requirement

The LHWCA provides recovery:

> If the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

33 U.S.C. § 903(a). Whether an adjoining area is a § 903(a) situs is determined by the nature of the adjoining area *at the time of injury*. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 304 (5th Cir. 2002); *Nelson v. Guy F. Atkinson Constr. Co.*, 29 B.R.B.S. 39, 41 (1995) (emphasis added).

The Employer's facility is located along a waterway. While the facility does not have a wooden, concrete, or other type of dock or wharf which extends out into Port Canaveral (Tr. 54), the property does contain a cement seawall to which boats are occasionally tied up while delivering product to the Employer (Tr. 37). The boats come into the seawall from the ocean after completing their fishing trip (Tr. 36-37). From March 22, 2003

through June 1, 2003, the Employer processed 90 boat trips of scallops and nine boat trips of shrimp, with at least some of that volume being unloaded via the seawall on the property (Tr. 162-164). At the time of the alleged injury, shrimp was being unloaded from a shrimp boat tied to the seawall (Tr. 165).

Given the location of the Employer's facility, its proximity to Port Canaveral and the ocean, its seawall which is used occasionally to unload and receive product, and given that the area in question was being used at the time of injury to unload a shrimp vessel, I find that the Claimant has established the situs requirement of LHWCA jurisdiction.

Status Requirement

The 1972 Amendments indicated intent by Congress to cover those workers involved in the essential elements of unloading a vessel, taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. *See Caputo*, 432 U.S. at 267. "[The Amendment] also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered [by the Act]." *Id*. "The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage." *Id*. "Indeed, such a construction is appropriate for this remedial legislation." *Id*. "The Act must be liberally construed with its purpose, and in a way which avoids harsh and incongruous results." *Id.* citing *Voris v. Eikel*, 346 U.S. 328, 333 (1953).

In *Caputo*, the Supreme Court stated that workers who spend "at least some of their time in indisputably longshoring operations" are covered under the Act. *Caputo*, 432 U.S. at 273. In response, several circuits reviewed the totality of the employee's duties to determine whether some of the employee's time was engaged in maritime activities covered under the Act. In *Levins v. Benefits Review Board*, the First Circuit examined the totality of the claimant's job and noted that serving as a runner, a covered job, constituted not "discretionary or extraordinary occurrences, but rather [was] a regular portion of the *overall* tasks to which petitioner could have been assigned as a matter of course." *Levins*, 724 F.2d 4, 9 (1st Cir. 1984) (original emphasis). In *Boudlouche v. Howard Tucking Co.*, the Fifth Circuit concluded that an employee who worked between 2.5 and 5 percent of his time in traditional longshore operations was covered, as some of his time was spent in longshoring activities. *Boudlouche*, 632 F.2d 1346, 1348 (5th Cir. 1980).

The Court went on to note, however, that their decision did not attempt to define the point where a worker's employment in maritime activity would become so momentary or episodic as to not suffice to confer longshore employee status. *Id*.

The 1984 Amendments to the Act created a list of excluded employment activities that would not be covered under the Act. The relevant employee activity at issue here is the exception for aquaculture workers. *See* 33 U.S.C. § 902(3). While the Act did not define the term aquaculture worker, the Code of Federal Regulations defines the term as:

> Those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including … the cultivation and harvesting of shellfish….

20 C.F.R. § 701.301(a)(12)(iii)(E) (1994).

Pursuant to the Act, as amended, and the regulations, I must first determine if the Claimant is an aquaculture employee completely excluded by the Act. If the Claimant performs maritime duties and is not an aquaculture employee or if he performs more than momentary or episodic maritime duties while operating as an aquaculture employee, he will still be entitled to coverage under the LHWCA.

The Employer is a commercial processor of shellfish, specifically scallops, shrimp, and scallop medallions (Tr. 120, 149). The Claimant testified that the Employer does nothing but process seafood (Tr. 56). As such, I find that the Employer is a commercial enterprise involved in the processing or cultivation and harvesting of shellfish as contemplated by 20 C.F.R. § 701.301(a)(12)(iii)(E) (1994). The parties stipulated that the Claimant was an employee of Bluepoint at the time of the accident (Tr. 6). I find, therefore, that the Claimant is an aquaculture worker, as defined by § 701.301, and is, therefore, excluded from coverage under the Act unless he performed maritime activities as "some" part of his duties. *See generally, Caputo, supra*.

The Employer tracks employee labor daily through assignment of the employee's time and associated costs to various tasks associated directly or indirectly with the processing of product (Tr. 195). The Employer then uses this task-particular labor cost to determine the net cost of a particular lot of finished seafood (Tr. 145-46). This assignment of employee time is done

on a daily basis. If an employee performed a minor task outside of normal duties during a particular day, *e.g.*, processing scallops, all of that employee's time for that day would be applied to the "assigned" task for that day (Tr. 195). The Employer will not record a 20-minute change of what someone does in an eight to ten-hour day.

The Claimant worked as a seasonal employee of the Employer for several years (Tr. 132). The Claimant was hired on this occasion in anticipation of an upcoming calico scallop run (Tr. 144). He was hired on January 30, 2001 and last worked for the Employer on June 4, 2001 (Tr. 147-48). During that time, the Employer ran 108 production days with the Claimant working 82 of those 108 days (Tr. 147-48).

The Claimant worked inside the processing plant when the Employer was making scallop medallions (Tr. 102). The Employer's record reflects, and there appears to be no argument, that from January 30, 2001 through March 22, 2001, the Claimant was processing scallop medallions in the processing plant (Tr. 149). The Employer's labor records show that the Claimant worked 38 days during this period processing scallop medallions (Tr. 149). I find that during this period, the Claimant was an aquaculture worker, that he engaged in no maritime activity, and that this phase of work is not covered under the Act.

Between March 22, 2001 and June 1, 2001, the Employer processed 90 boat trips of scallops weighing 3,212,000 pounds gross, and nine boat trips of shrimp weighing 49,446 pounds gross (Tr. 162-164). Of those nine shrimp boat loads, only four were delivered alongside the seawall (Tr. 164). Keith Smith, the General Manager at Bluepoint, testified that during the period of March 22 – June 1, 2001, the Claimant's only assigned job was to process calico scallops (Tr. 154). The shaker was the first step in the processing of scallops (EX 16, p. 27). As scallops arrive at the facility, the first phase of processing is a prepping stage performed outside of the building where grit, gravel, and debris are removed from the scallop shells, via the shaker, before further processing begins inside the facility (Tr. 120).

The Claimant testified that "yard work" was his main job (EX 16, p. 32). This yard work was performed outside between the processing plant and the waterfront (Tr. 103). When scallops were not being processed, the Claimant maintained the yard areas by pulling weeds, picking up trash, occasionally running a fork lift, and by mowing the grass (Tr. 99; EX 16,

p. 33). When scallops arrived at the plant, the Claimant would take his position in processing, and then after that particular load was processed, he would return to yard work (EX 16, p. 33).

When scallops arrived and yard maintenance was set aside, the Claimant either ran the shaker, which cleared debris away from the scallops, or he would shovel underneath the shaker (Tr. 103). When the shaker was running, someone would need to shovel underneath the machine to clear the debris and mud being washed off of the scallops (EX 16, p. 19). If this mud was not cleared, the buildup would eventually clog the bucket and stop processing (EX 16, p. 24). The Claimant testified that he spent approximately 25 percent of his scallop processing time actually running the shaker, and approximately 75 percent of that time clearing mud from under the shaker (EX 16, p. 32). The Claimant testified that at no time during the handling of scallops did he ever help get the scallops off of a boat or load scallops into the hopper for processing at the shaker (EX 16, p. 25).

The Claimant's yard work, consisting of mowing, weed-eating, and trash pick up, is not maritime activity. The Claimant's work processing calico scallops was aquaculture work, specifically excluded under the Act. The Claimant testified that at no time during scallop production did he engage in the loading or unloading of a vessel. I find that the time spent by the Claimant doing yard work and processing scallops is not maritime activity covered under the Act.

This leaves only the time allegedly spent by the Claimant working with shrimp. From March 22, 2001 through June 1, 2001, Bluepoint processed nine shrimp boats carrying 49,446 pounds gross of shrimp (Tr. 163). Of those nine shrimp boats, only four vessels delivered shrimp via the seawall adjoining the property (Tr. 164). A normal shrimp boat carries between 800-900 bags of shrimp (Tr. 91). The crew of the shrimp boat would lift the bags of shrimp out of the ship's hold and then send them down a chute to a waiting conveyor system which moved the shrimp into the processing plant (Tr. 91). The conveyor system moved the shrimp quickly to prevent thawing (Tr. 168). After arriving in the plant, the shrimp was weighed, sorted according to type of shrimp, palletized, wrapped in saran wrap and then quickly moved to a freezer (Tr. 91, 93). A normal pallet was loaded with five bags per layer, six bags high, for a total of 30 bags (EX 16, p. 44).

The record at this point becomes inconsistent. The Employer's normal procedure for handling incoming shrimp was to

use the conveyor system to move shrimp into the plant (Tr. 168). The Claimant's activity in this process, if needed, was to assist in moving shrimp bags from the delivery chute to the conveyor (Tr. 93-94).

Despite Bluepoint's normal conveyor procedure, the Claimant testified that his job was to place bags of shrimp onto pallets at the seawall where they were saran-wrapped and then fork-lifted into the plant (Tr. 41). The Claimant testified that he performed yard work most of the time and palletized shrimp bags when a shrimp boat delivered via the seawall (EX 16, p. 19).

While the Claimant testified that the shrimp conveyor had been broken for almost two years (EX 16, p. 36), both Frank Goche, the fork lift operator, and Keith Smith, the plant General Manager, testified that the conveyor system was in place and was used as needed to move shrimp (Tr. 93, 168). Frank Goche testified that the Claimant would only handle shrimp by moving shrimp bags from the chute onto the conveyor (Tr. 93).

The Claimant's testimony regarding the respective amounts of time spent on shrimp and scallop processing varied substantially. At various times, the Claimant testified that he spent 35% (Tr. 84), about 50% (Tr. 65), and up to 70% of his time unloading shrimp (Tr. 43). At yet another point, the Claimant stated that moving shrimp into the plant represented a very small part of his work (Tr. 67).

The Claimant previously testified that he had unloaded three or four shrimp boats on the day of the injury (EX 16, p. 41). During the hearing, however, the Claimant testified that he didn't remember any other ships arriving that day (Tr. 41). Frank Goche, the fork lift operator, testified that only one boat was processed the day of the alleged injury (Tr. 95).

The Employer's records show that only four shrimp boats delivered to the seawall during the Claimant's employment (Tr. 164). The Employer maintains that the shrimp boat of June 1, 2001 was the only one in which shrimp bags were loaded onto a pallet at the seawall instead of inside the plant (Tr. 165). On June 1, 2001, the shrimp boat in question experienced freezer problems and requested that Bluepoint take its partial load to avoid spoilage of its cargo (Tr. 168). While a normal shrimp boat carries 800-900 bags of shrimp (Tr. 91), this boat was carrying approximately 45 bags of shrimp with an average of 43 pounds of shrimp per bag (Tr. 94). While

Bluepoint would normally use its conveyor system, at the time in question another boat was already tied up to the seawall blocking access to the chute and the conveyor (Tr. 94). To avoid spoilage, Bluepoint employees laid a piece of plywood between the boat and the seawall to allow the boat's crew to slide the small load down to the seawall (Tr. 94). The Claimant was placing off-loaded bags onto a pallet near the seawall in preparation of being fork-lifted into the plant when the alleged injury took place (Tr. 41). The Employer maintains that bypassing the normal conveyor system was a one-time, necessary occurrence due to the immediate need to avoid spoilage, and that such a delivery was precipitated by a larger boat already tied to the seawall, which effectively blocked the normal conveyor system (Tr. 169).

The language of the Act and *Caputo* protects those employees who walk in and out of coverage on a frequent basis to avoid the shifting coverage caused by a worker's constant movement during the workday between land and sea. *Sea-Land Serv., Inc. v. Rock*, 953 F.2d 56, 67 n. 17 (3rd Cir. 1992). There is a point, however, where a worker's employment in maritime activity becomes so momentary or episodic that it will not suffice to confer coverage under the Act. *See Dorris v. Director, OWCP*, 808 F.2d 1362, 1365 (9th Cir. 1987) (truck driver's occasional maritime duties were too "momentary and episodic" to qualify him for maritime status), and *Lewis v. Sunnen Crane Serv., Inc*., 31 B.R.B.S. 34, 40 (1997) (regular maritime duties as infrequent as 3.6% to 8.5% of claimant's time may confer jurisdiction, but claimant's duties can still be so momentary or episodic that LHWCA jurisdiction will not attach).

Subsequent to the 1984 Amendments and the addition of the aquaculture employee exception, the Ninth Circuit issued its holding in *Alcala v. Director*, OWCP, 141 F.3d 942 (9th Cir. 1998). In *Alcala*, the claimant sought LHWCA benefits after he injured his shoulder and back in his employer's warehouse. *Id*. at 943. The employer was a large cannery that processed tuna, squid, mackerel, and pet food. *Id*. The employer's facility was situated beside a dock in a harbor at Long Beach, California. *Id*. Fish delivered by ship would be unloaded by the ship's crew and left in bins on the dock. *Id*. In the year of the claimant's injury, only one ship delivered fish via the dock. *Id*.

The claimant was a warehouse fork lift operator at the time of injury. *Id*. The claimant asserted, however, that he occasionally moved bins of fish on the dock if there were too

few outside drivers. *Id*. The claimant argued that by doing both aquaculture work and maritime work, he qualified for LHWCA coverage under *Caputo*. *Id*. at 945. To bolster his argument, the claimant cited *Ljubic v. United Food Processors*, 27 B.R.B.S. 112 (1993), *aff'd*, Nos. 93-1949 and 93-2255, 1996 WL 582352 at *3 (B.R.B. Sept. 11, 1996), where that covered claimant performed 60% aquaculture work and 40% of his time doing repair work on machinery that was critical to the unloading of vessels.

The *Alcala* Court noted that the claimant in their case had significantly fewer maritime duties than the claimant's 40% of maritime activity in *Ljubic*. Alcala was a fork lift driver, and all of his duties, whether inside or outside, revolved around that particular task. *Alcala*, 141 F.3d at 945. The Court held that the employer's expectation that the claimant would only work within his normal area and normal tasks, coupled with the fact that only one ship had delivered fish in the year that the claimant was injured, made the claimant's outside dock work infrequent, episodic, and entirely discretionary in nature. *Id*. The Court also noted that the Employer's first step in processing, which was to freeze the fish quickly, included all of the actions undertaken to get the fish from the dock to the freezer (a span of less than 300 yards) as rapidly as possible. *Id*. at 946. The Court held that this additional, incidental maritime unloading did not confer LHWCA jurisdiction over the claimant's injury. *Id*.

Here, the Claimant was hired in anticipation of the upcoming calico scallop run. While waiting for that run to commence, the Claimant worked in the plant making scallop medallions and then worked outside performing yard work. When the scallop run began, the Employer expected the Claimant to either operate the shaker or to shovel debris away as the shaker operated. The Employer's witnesses and the Employer's records show that this was the extent of the Claimant's assigned duties. Like the employer in *Alcala*, this Employer had a legitimate expectation that the Claimant would only work within his normal area and normal tasks, making small deviations from those tasks more likely to be considered infrequent, episodic, and discretionary in nature.

The record and the Claimant's testimony show that the Claimant undertook no maritime activities while processing scallops and doing yard work. The Claimant's work with shrimp boats is limited to the four shrimp boats that delivered shrimp via the seawall during the Claimant's employment. In three out

of those four boats, Bluepoint utilized the normal conveyor system to move shrimp into the plant.

Even if the Claimant moved bags from the chute to the conveyor on those three deliveries, however, he would not be involved in covered maritime activity. Like the employer in *Alcala*, Bluepoint's first step in processing product is to quickly move the received product into the plant and ultimately the freezer to maintain quality. Like the employer in *Alcala*, all of the actions taken to get product from the dock to the freezer as rapidly as possible is part of that first step in processing. Like the employer in *Alcala*, Bluepoint also moved the product only a short span up the conveyor into Bluepoint's facility for the second step in processing. I find that the process of moving the off-loaded shrimp bags from the chute to the conveyor was the first step in processing the shrimp and, as such, was aquaculture work excluded under the Act.

Additionally, even if loading shrimp bags from the chute to the conveyor was considered essential to the "unloading" of a sea vessel, the small amount of product received via those shrimp boats does not rise to the level of covered maritime activity. Over the Claimant's employment period, Bluepoint received 3,261,446 pounds of scallops and shrimp. At most, the Claimant *could* have helped unload the four shrimp boats that delivered to the seawall. While recognizing that as little as 2.5% of maritime activity can give rise to coverage (*See Boudlouche* 632 F.2d at 1348), this small level of possible activity leans heavily towards infrequent, episodic, and discretionary activity.

The Claimant's testimony regarding his employment duties is unreliable. The Claimant makes several conflicting statements regarding the nature, extent, and duration of his duties while working for the Employer. The Claimant also discusses a burned out conveyor motor which appears to have been in normal working order throughout the period in question. I find the Claimant's testimony as to his normal duties to be unreliable, and I afford it little weight.

Finally, the shrimp boat that was being unloaded when the Claimant was allegedly injured was an episodic event. That shrimp boat was experiencing mechanical problems or it wouldn't have sought to unload at all. The boat was running with only about 5% of a normal load (45 bags out of a normal load of 800-900 bags). The boat couldn't tie off near the conveyor system because another ship was blocking that area. Instead of

palletizing the shrimp in the warehouse, as normal, the Employer was forced to adapt its system to accommodate this unusual occurrence. The entire shrimp receiving system was bypassed for a unique and solitary situation. I find that this shrimp boat unloading was an episodic event, not covered under the Act.

Given the Employer's normal receiving practices, the Employer's purpose in hiring the Claimant, the Claimant's normal assigned duties, the Employer's established procedures for processing shrimp and scallops, the Claimant's unreliable testimony, and the unique situation resulting in the Claimant's alleged injury, I find that the Claimant was at all times an aquaculture worker, excluded from coverage under the Act, and I find that the infrequent, episodic, and discretionary nature of the Claimant's work assisting in the receiving of shrimp was insufficient to establish maritime activity that would be covered under the Act.

The Claimant's injury is not covered under the LHWCA.

Entitlement

The Claimant, Timothy J. Monteleone, has not established entitlement to benefits under the LHWCA.

Attorney Fees

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

ORDER

Based on the Findings of Fact and Conclusions of Law expressed herein, it is, hereby,

ORDERED that the claim of Timothy J. Monteleone for benefits under the Act is hereby DENIED.

A

Robert L. Hillyard
Administrative Law Judge